Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALLEN LUEBBERS,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether a state procedural rule in a collateral proceeding is inherently inadequate to bar review of a federal habeas petition, upon a federal court's conclusion that the state law remedy for post-conviction counsels' noncompliance with a state rule did not allow adequate representation in the collateral proceeding?

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IN THE
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ALLEN LUEBBERS,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petitioner, Superintendent Luebbers, prays the Court for its order granting a writ of certiorari to review the judgment of the court below reversing in part the denial of Respondent White's application for writ of habeas corpus.

OPINIONS BELOW

The March 14, 2000 panel opinion of the United States Court of Appeals for the Eighth Circuit, for which petitioner seeks this Court's review, is reported at 206 F.3d 776 (8th Cir. 2000), and published in the Appendix at App. 1. The December 23, 1999 panel order of the United States Court of Appeals for the Eighth Circuit ordering additional briefing is published at

App. 14, but is not reported. The district court's December 4, 1998 order denying the petition for writ of habeas corpus is published at App. 170, but is not reported. The district court's May 1, 2000 order directing the parties to file supplemental briefing is published at App. 95, but is not reported.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on March 14, 2000 (App. 1). The court below denied the petition for rehearing with suggestions for rehearing *en banc* on April 21, 2000 (App. 98). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sixth amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Section 1 of the fourteenth amendment to the Constitution of the United States provides in pertinent part: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Subsection (i) of 28 U.S.C. § 2254 provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

STATEMENT OF THE CASE

A. State court proceedings

Respondent White and two companions went to the house of Donald Wright, purportedly to buy drugs. (App. 99-100, reported at State v. White, 813 S.W.2d 862, 863 (Mo. 1991) (en banc) (White I), cert. denied, 502 U.S. 1103 (1992)). With White's gun to his head, Wright denied that there was money and drugs in the house. (App. 100). The occupants of the house, Wright, Carol Kinney, Kinney's two children, and Ernest Black, were then tied up. (App. 100). White and his companions beat Wright and Black with their guns and unsuccessfully interrogated them about any money and drugs in the house. White said the adults should die and then White slit Wright's throat. (App. 100). After turning on the gas burners and extinguishing the pilot light to the stove, White and his companions left the house. (App. 100). Wright died from his injuries. (App. 100). Kinney and Black survived the attack and later identified their attackers. (App. 100). A jury in the Circuit Court of Jackson County, Missouri found White guilty of one count of first degree murder, Mo. Rev. Stat. § 565.020 (1986), three counts of armed criminal action, Mo. Rev. Stat. § 571.015 (1986), and two counts of first degree assault, Mo. Rev. Stat. § 565.050 (1986). Upon the jury's recommendation, on April 14, 1989, the trial court imposed the death sentence for the first degree murder conviction, and prison terms for the other offenses.

After White filed his pro se motion for post-conviction relief under Missouri Supreme Court Rule 29.15 (1988)[1],

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[1]Missouri Supreme Court Rule 29.15(a) (1988) provided that

counsel was appointed on September 25, 1989. (App. 101). Rule 29.15(f) gave appointed counsel thirty days in which to file an amended motion.[2] Within that period, counsel sought and obtained the one and only authorized extension under Rule 29.15(f)[3], thereby extending the amended motion's due date to November 23, 1989. (App. 115, reported at State v. White, 873 S.W.2d 590, 593 (Mo. 1994) (en banc) (White II)). Without leave of court, counsel withdrew on November 9, 1989. (App. 101-102). A second attorney filed the amended motion on November 27, 1989. (App. 101). Notwithstanding Rule 29.15(f), counsel filed a second amended motion on January 8, 1990. (App. 101). Accompanying each of the amended motions was a document wherein White verified that he knew

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> [a] person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. . . .

[2]"Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed." Mo. S.Ct. R. 29.15(f) (1988).

[3]"The court may extend the time for filing the amended motion for one additional period not to exceed thirty days." Mo. S.Ct. R. 29.15(f) (1988).

the contents of the amended motion, that the information in the amended motion was to the best of his knowledge and belief true and correct, and that White had listed every ground for relief known to him at the time of signing the verification. White signed these verifications on November 14, 1989, prior to completion of either amended motion, and thus without having reviewed the contents of any amended motion (App. 115).

On July 23, 1991, the Missouri Supreme Court affirmed the judgment of conviction and sentences but remanded White's post-conviction relief case to the motion court for a determination "whether the movant received post-conviction representation in the sense of Rule 29.15." (App. 102-103). Because post-conviction counsel did not timely file the amended motion, he was deemed to have "abandoned" White under state law. (App. 124). Under the authority of Sanders v. State, 807 S.W.2d 493 (Mo. 1991) (en banc), the Missouri Supreme Court ordered that White's untimely first amended motion be reinstated. (App. 129). But because the post-conviction rules did not permit a second extension of time to file an amended motion, the Missouri Supreme Court concluded that White was not entitled to "additional relief beyond that which is required by Rule 29.15." (App. 129). And because White had signed the verification for the amended motion in blank, without actually reviewing the amended motion, the state court would not treat the first amended motion as a nullity and allow the appointment of new counsel and filing of a third amended motion. (App. 120, 126). The case was remanded to the motion court. (App. 131). Following denial of post-conviction relief, the Missouri Supreme Court affirmed the judgment of the motion court. (App. 132, reported at White v. State, 939 S.W.2d 887 (Mo.) (en banc), cert. denied, 522 U.S. 948 (1997) (White III)).

B. Federal habeas corpus proceedings

On December 26, 1997, White filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri. White filed an amended petition on January 14, 1998. The District Court denied the petition on December 4, 1998. (App. 17). The District Court determined that the State's procedural rule governing pleading requirements in post-conviction proceedings under Missouri Supreme Court Rule 29.15 was independent and adequate. (App. 45–46). Upon that basis, the District Court held that White had procedurally defaulted the majority of his claims and denied relief upon those claims. (See, e.g., App. 48, 55, 61-62, 68, 71, 91, 92).

White appealed. The District Court granted a certificate of appealability including both substantive and procedural issues. Following oral argument, the United States Court of Appeals for the Eighth Circuit expanded the certificate of appealability and ordered the parties to submit additional briefs on a number of issues, including, inter alia, "[w]hether the Missouri Supreme Court's remedy for this abandonment was not based on an adequate and independent state ground, and violated due process." (App. 15). In answer to that question, the panel concluded that the Missouri Supreme Court's remedy for the abandonment by post-conviction counsel was not an adequate state ground for the denial of the Rule 29.15 motion. (App. 10). The court below therefore reversed that portion of the District Court's judgment holding that White's grounds for relief were procedurally barred from federal habeas corpus review. The panel decision remanded the cause to the District Court for resolution of all remaining constitutional claims on the merits. (App. 12). The State's petition for rehearing with suggestions for rehearing *en banc* was denied on April 21, 2000 (App. 98).

SUMMARY OF ARGUMENT

A.

In the context of a petition for writ of habeas corpus heard in federal court, review will be denied when the state court declined to address a federal claim because the prisoner fails to meet a state procedural requirement. Here, merits review by the state court of numerous grounds was denied based on White's failure to meet the procedural requirements regarding the sufficiency of post-conviction pleadings, in particular the time and verification requirements of Missouri Supreme Court Rule 29.15. Its meaning and application were readily ascertainable and regularly enforced at the time White sought post-conviction relief. Its procedural requirements serve the valid state interests of preventing delay in litigation, ascertaining that the claims raised are those of the movant, and finality. Failure to comply with those procedural rules are an independent and adequate ground for the denial of White's post-conviction motion. A narrow exception to the absolute bar to consideration of an untimely amended motion actually applied in White's case. The application of that exception -- to White's benefit -- did not create some new right to post-conviction counsel.

B.

The court of appeals, in determining that the state procedural rule barring consideration of a second untimely amended motion for post-conviction relief was inadequate, failed to acknowledge Missouri Supreme Court precedent. White's access to counsel in the post-conviction proceedings derived from a state rule of court. In its conclusion that "abandonment" under state law by post-conviction counsel

should have included the content of the motion as well as failure to comply with the time requirements of Rule 29.15, the court of appeals found a constitutional right to effective assistance of post-conviction counsel. The court of appeals' retroactive application of that new rule of constitutional law violates Teague v. Lane, 489 U.S. 288 (1989).

C.

The court of appeals has announced, in practical effect, a new rule of constitutional law: the state must provide constitutionally-effective counsel in a post-conviction proceeding in order for a violation of a state procedural ground to give rise to an adequate state ground. That rule contravenes the established rule that the Constitution does not entail a right to counsel in a collateral proceeding. The effect of the court of appeals' determination is to eviscerate the rule that performance of post-conviction counsel cannot provide a basis for establishing "cause" to excuse a procedural default.

ARGUMENT

THE COURT OF APPEALS' DETERMINATION -- THAT THE STATE PROCEDURAL RULE BARRING THE CONSIDERATION OF A SECOND AMENDED POST-CONVICTION MOTION WAS INADEQUATE AS A MATTER OF FEDERAL LAW BECAUSE THE STATE COURT RESPONSE TO STATE LAW "ABANDONMENT" BY POST-CONVICTION COUNSEL WAS INSUFFICIENT -- PRODUCES A RESULT CONTRARY TO THAT DICTATED BY THIS COURT'S DECISIONS IN COLEMAN v. THOMPSON, 501 U.S. 722 (1991) AND PENNSYLVANIA v. FINLEY, 481 U.S. 551 (1987), AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The courts of appeals have held, in accord with Coleman v. Thompson, 501 U.S. 722 (1991), that the performance of counsel in a collateral proceeding cannot constitute "cause" to permit habeas corpus review of a procedurally defaulted federal constitutional claim. See, e.g., Hull v. Freeman, 991 F.2d 86, 91 (3rd Cir. 1993); Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997) (en banc), cert. denied, 522 U.S. 1100 (1998); Fairman v. Anderson, 188 F.3d 635, 643 (5th Cir. 1999); Byrd v. Collins, 209 F.3d 486, 516 (6th Cir. 2000); Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995); Burns v. Gammon, 173 F.3d 1089, 1093 (8th Cir. 1999); Poland v. Stewart, 169 F.3d 573, 587 (9th Cir. 1999); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996). The circuit courts of appeals have so held even though the collateral proceeding was the first opportunity in which to raise a constitutional claim. See, e.g., Mackall, 131 F.3d at 449; Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992); Bonin v. Vasquez, 999 F.2d 425, 429-430 (9th Cir. 1993); Parkhurst, 128 F.3d at 1371; Hill, 81 F.3d at 1024-1025.

Yet under the guise of determining that a state procedural rule was not adequate to preclude federal habeas corpus review, the Eighth Circuit avoided binding precedent, including Coleman and Pennsylvania v. Finley, 481 U.S. 551 (1987). The decision of the court of appeals rested upon its conclusion that, for purposes of federal law, the state court did not provide what the court of appeals considered a sufficient remedy upon the finding that post-conviction counsel did not comply with a state procedural rule during a collateral proceeding.

Because there is no constitutional right to counsel in a collateral proceeding, see Finley, 481 U.S. at 559, it is wrong to determine the adequacy of a state procedural rule based upon the performance of non-constitutionally-mandated counsel. Cf. Murray v. Giarratano, 492 U.S. 1, 11 (1989) ("[I]t would be a strange jurisprudence that permitted the extension of that holding [in Bounds v. Smith, 430 U.S. 817 (1977) requiring states to furnish access to adequate law libraries to effectuate the right to access to the courts] to partially overrule a subsequently decided case such as Finley which held that prisoners seeking judicial relief from their sentence in state proceedings were not entitled to counsel.") (plurality).

The rule of law in the Eighth Circuit is now that a state procedural rule will not constitute an independent and adequate state ground to support a procedural bar absent the provision in a collateral proceeding of the effective assistance of counsel. That rule cannot be reconciled with Coleman and this Court's holdings regarding "independent and adequate" state grounds for decision.

Certiorari is warranted as follows:

(1) The decisions of this Court holding that post-conviction counsel's representation cannot be "cause" to overcome default in a collateral proceeding are no longer important to the Eighth Circuit. Where the state ground cannot stand to support a procedural bar, there is no enforceable procedural default and no basis for inquiry into issues of cause and prejudice. The decision below circumvents "procedural default" jurisprudence and conflicts with this Court's decisions in Coleman and Finley, thereby creating a new rule of constitutional law retroactively applied on collateral review, contrary to Teague v. Lane, 489 U.S. 288 (1989) and Allen v. Hardy, 478 U.S. 255 (1986) (per curiam). That rule conflicts with holdings by every circuit court of appeals (including, before this case, the Eighth Circuit) that actions by post-conviction counsel are not attributable to the state. See supra, at 10.

(2) The decision of the court of appeals creating a constitutional right to post-conviction counsel also contravenes 28 U.S.C. § 2254(i), and conflicts with those courts applying § 2254(i). See, e.g., Rodriguez v. Scillia, 193 F.3d 913, 916 n.3 (7th Cir. 1999) (failure of counsel in post-conviction proceeding to raise issues does not constitute cause to overcome default of those issues); Neal v. Gramley, 99 F.3d 841, 843 (7th Cir. 1996) (same), cert. denied, 522 U.S. 834 (1997); Terry v. Gillis, 93 F.Supp. 603, 614 (E.D. Pa. 2000); Oken v. Nuth, 64 F.Supp. 488, 498 n.8 (D. Md. 1999); Lugo v. Kuhlmann, 68 F.Supp. 347, 375-376 (S.D. N.Y. 1999); Gentry v. Trippett, 956 F.Supp. 1320, 1326 (E.D. Mich. 1997), aff'd 173 F.3d 855 (6th Cir.) (table), cert. denied, 526 U.S. 1149 (1999); Breard v. Netherland, 949 F.Supp. 1255, 1265-1266 (E.D. Va. 1996), aff'd 134 F.3d 615 (4th Cir.), cert. denied, 523 U.S. 371 (1998).

(3) The resulting order, remanding the cause for merits determination of White's constitutional claims, requires the

district court to violate a federal court's duty not to decide a constitutional question unless a decision on that basis is unavoidable. New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979); County Court of Ulster County, New York v. Allen, 442 U.S. 140, 154 (1979); see also Slack v. McDaniel, ___ U.S. ___, 120 S.Ct. 1595, 1604 (2000). Resolution of the procedural default issue, a threshold matter, is "fundamental to the further conduct of the case." Gillespie v. United States Steel Corp., 379 U.S. 148, 153-154 (1964); Land v. Dollar, 330 U.S. 731, 734 n.2 (1947); see also Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 31 (1943) (citing State of Maryland v. Soper (No. 1), 270 U.S. 9, 29 (1926) (considerations of comity between state and federal courts believed to present special circumstances)).

(4) And the order of the court below "undermine[s] the State's interest in enforcing its laws." Coleman, 501 U.S. at 730-731.

A. The Missouri rules governing the filing of an amended post-conviction motion are independent and adequate state grounds for the denial of post-conviction relief in state and federal court.

A federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman, 501 U.S. at 729. Federal habeas corpus review will be denied "when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Id. at 729-730. A state procedural ground is adequate where the procedural rule is strictly or regularly followed, Johnson v. Mississippi, 486 U.S. 578, 587 (1988), and "where 'the State's

insistence on compliance with its procedural rule serves a legitimate state interest,'" Wainwright v. Sykes, 433 U.S. 72, 83 n.8 (1977). Missouri Rule 29.15 met both criteria -- until the court of appeals departed from precedent and evaluated it in a novel and problematic way.

To understand the procedural bar in this case and to determine that it is an "adequate" bar requires a basic understanding of the Missouri rules involved. Since 1953, the Missouri Supreme Court "has provided procedural rules for criminal defendants seeking post-conviction relief from the sentencing court." Schleeper v. State, 982 S.W.2d 252, 253 (Mo. 1998) (en banc), cert. denied, 527 U.S. 1026 (1999). Missouri's post-conviction proceedings under Missouri Supreme Court Rule 29.15 (effective January 1, 1988), are collateral to the criminal conviction. Lowe-Bey v. Groose, 28 F.3d 816, 818-820 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

Rule 29.15 provides time limits both for the filing of the pro se motion for post-conviction relief and for an amended motion filed by counsel. Rule 29.15(b), (f); see also Thomas v. State, 808 S.W.2d 364, 365 (Mo. 1991) (en banc). The time limits under Rule 29.15 are "valid and mandatory," Day v. State, 770 S.W.2d 692, 695 (Mo.) (en banc), cert. denied sub nom. Walker v. Missouri, 493 U.S. 866 (1989), and are intended "to avoid delay and prevent the litigation of stale claims," Sloan v. State, 779 S.W.2d 580, 581 (Mo. 1989) (en banc), cert. denied, 494 U.S. 1060 (1990). Rule 29.15 "contains no authority for extension of the time limits expressly stated." White v. State, 779 S.W.2d 571, 572 (Mo. 1989) (en banc). A timely filed amended motion for post-conviction relief also must be verified by the movant. Rule 29.15(f). "Unless both the time and verification requirements are met, the

motion court has no jurisdiction to rule on the defendant's 29.15 motion." (App. 119).

When White filed his pro se motion on August 17, 1989 and the first amended motion on November 28, 1989, the timeliness and verification requirements under Rule 29.15(f) were readily ascertainable and regularly enforced. See, e.g., Day, 770 S.W.2d at 695 (time limits); Mills v. State, 769 S.W.2d 469, 470 (Mo. Ct. App. 1989) (verification). Failure to comply with those mandatory procedural rules precluded the state court from exercising jurisdiction over the post-conviction motion. See Quinn v. State, 776 S.W.2d 916, 918 (Mo. Ct. App. 1989).

After the state motion court ruled upon White's pro se and amended motions for post-conviction relief but before his first appeal, the Missouri Supreme Court created a narrow exception to the absolute bar to consideration of amended motions that violated Rule 29.15(f). That exception covers instances where a pro se petitioner's counsel "abandons" him, as understood pursuant to state law. "Abandonment" occurs when, *through no fault of the movant*, (1) appointed counsel files an untimely amended motion, Sanders v. State, 807 S.W.2d 493 (Mo. 1991) (en banc), or (2) appointed counsel completely fails to file an amended motion, Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc).[4]

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[4]"Abandonment" may also result where the amended motion is filed without the movant's verification or declaration that the amended motion includes all claims for relief known and that the movant understands that failure to list a claim constitutes a waiver of that claim. (App. 126). Because White had signed the verifications prior to the actual drafting and thus without review of the amended motions, the state supreme court attributed the improper verification to White. (App. 120, 126).

The Missouri Supreme Court has not equated "abandonment" under state law with "ineffective assistance of counsel" under federal law, and the Missouri Supreme Court does not consider the sufficiency of the post-conviction motion's content in defining "abandonment." See, e.g., State v. Owsley, 959 S.W.2d 789, 799 (Mo.) (en banc) ("Owsley's post-conviction counsel filed a timely and verified amended motion. The fact that its poor content and structure resulted in its dismissal does not mean that Owsley was abandoned. His abandonment claim is nothing more than a claim of ineffective assistance of post-conviction counsel, which is 'categorically unreviewable.'"), cert. denied, 525 U.S. 882 (1998); State v. Parker, 886 S.W.2d 908, 932 (Mo. 1994) (en banc), cert. denied, 514 U.S. 1098 (1995) ("Parker's real argument is that post-conviction counsel 'did not do everything which might have been done,' which (even if true) does not constitute abandonment.").

The remedies for "abandonment" under state law depend upon the nature of the abandonment: counsel's failure to timely file an amended motion warrants consideration by the state motion court of that untimely filed amended motion, Sanders, 807 S.W.2d at 495, whereas counsel's complete failure to file an amended motion warrants the appointment of new counsel and time to file an amended motion within the time limits of Rule 29.15(f), Luleff, 807 S.W.2d at 498. Prior to the application of the remedy for state law "abandonment" in White's case, the Missouri courts regularly recognized these two distinct forms of "abandonment" and the applicable remedies. See, e.g., Pollard v. State, 807 S.W.2d 498, 502 (Mo.) (en banc), cert. denied, 502 U.S. 943 (1991); Foster v. State, 809 S.W.2d 863, 864 (Mo. Ct. App. 1991); State v. Simms, 810 S.W.2d 577, 583 (Mo. Ct. App. 1991); Vinson v. State, 807 S.W.2d 212 (Mo. Ct. App. 1991). And in providing the narrow exception in the case of "abandonment" under Rule

29.15, the Missouri Supreme Court did not permit consideration of an untimely filed second amended post-conviction motion. White II, 873 S.W.2d at 599 ("To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief *beyond that which he was originally entitled* to receive under Rule 29.15.") (emphasis added).

In his first appeal, in 1991, White received the benefit of the Sanders rule. The Missouri Supreme Court remanded White's post-conviction relief case to the motion court to determine "whether the movant received post-conviction representation in the sense of Rule 29.15." (App. 102-103). Because post-conviction counsel did not timely file the amended motion, counsel was deemed to have "abandoned" White as a matter of state law. (App. 126). Under the authority of Sanders, the Missouri Supreme Court ordered that White's untimely first amended motion be reinstated. (App. 128-129).

The court below, concluding that the state supreme court "stated a new rule limiting the remedy for abandonment" (App. 8), failed to acknowledge Sanders. Instead, the court of appeals focused upon the remedy that the Missouri Supreme Court had pronounced in the other "abandonment" scenario, where appointed counsel completely fails to file an amended motion. (App. 8). Under state law, however, because White was "abandoned" when counsel filed an untimely amended motion, the Missouri Supreme Court selected the correct remedy for that form of abandonment when it deemed the untimely amendment to be timely. Under state law, no further remedy was afforded by the rules. The Missouri Supreme Court rejected White's attempt to invoke his own misfeasance in signing the verification prior to the existence of the amended motion to be verified as a basis for relief. (App. 120, 126). Finally, because there is not a constitutional right to post-

conviction counsel, the Missouri Supreme Court rejected White's argument that he was abandoned due to counsel's failure to allege sufficient facts and grounds for relief in the amended motion. (App. 126).

White returned to the Missouri Supreme Court in 1997, seeking review of the denial of his reinstated untimely first amended motion. The Missouri Supreme Court upheld the denial of the amended motion upon a different state procedural ground:

> An evidentiary hearing is not required where "the motion and the files and record of the case conclusively show that movant is entitled to no relief[.]" *Rule 29.15(g)* (1988).
>
> A Rule 29.15 motion is subject to requirements of timely filing and limitations on amendments. *Rule 29.15(b)(f)* (1988). Moreover, such motion must be substantially in the form provided by Form 40. *Rule 29.15(b)* (1988). Paragraph 8 of Form 40 requires a movant to state "concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence." Paragraph 9 of Form 40 requires a concise statement of "the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely[.]" Once counsel is appointed, "[i]f the motion does not assert sufficient facts . . . counsel shall file an amended motion which sufficiently alleges the additional facts and grounds." *Rule 29.15(e).* The redundant requirement to plead facts makes

clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. *See Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. For that reason, it has been held that no evidentiary hearing will be required unless the motion meets three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Starks,* 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance

> did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced. *See Hill v. Lockhart,* 474 U.S. 52, 60, 106 S.Ct. 366, 371, 88 L.Ed.2d 203 (1985); *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Because none of White's allegations satisfy this standard, his motion was properly overruled without an evidentiary hearing.

(App. 135-136).

Prior to White's filing of his pro se and first amended motions for post-conviction relief, Missouri courts consistently applied the sufficient pleading rule that applied to White governing post-conviction pleadings and the grant or denial of an evidentiary hearing. See, e.g., Simpson v. State, 779 S.W.2d 766, 767 (Mo. Ct. App. 1989); Morrison v. State, 779 S.W.2d 677, 684 (Mo. Ct. App. 1989); Arellano v. State, 779 S.W.2d 631, 632 (Mo. Ct. App. 1989); State v. Taylor, 779 S.W.2d 636, 645 (Mo. Ct. App. 1989); Burroughs v. State, 773 S.W.2d 167, 169 (Mo. Ct. App. 1989); Jones v. State, 771 S.W.2d 349, 352 (Mo. Ct. App. 1989); Moton v. State, 772 S.W.2d 703, 704 (Mo. Ct. App. 1989); Blackmon v. State, 767 S.W.2d 81, 83 (Mo. Ct. App. 1989).

Rule 29.15 is independent, as "it is neither intertwined with, nor dependent upon, federal law." Malone v. Vasquez, 138 F.3d 711, 717 (8th Cir.), cert. denied, 525 U.S. 953 (1998). Rule 29.15 is regularly followed, supra, at 16, 20, and serves the legitimate state interest of avoiding delay, preventing the litigation of stale claims, and ensuring that the amended motion contains all grounds known to the prisoner, and thus is

adequate. Sloan v. Delo, 54 F.3d 1371, 1380 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996).

Comity dictates that "the state courts should have the first opportunity to review" a claim that confinement violates federal law "and provide any necessary relief." O'Sullivan v. Boerckel, ___, U.S. ___, 119 S.Ct. 1728, 1732 (1999). Having failed to meet the State's procedural requirements for presenting his federal claims, White "deprived the state courts of an opportunity to address those claims in the first instance." Lambrix v. Singletary, 520 U.S. 518, 523 (1997). Yet the court below avoided the effect of the pleading requirement under Rule 29.15 -- which it had previously held to be an independent and adequate state ground, Smith v. Groose, 998 F.2d 1439, 1441 (8th Cir. 1993) -- by concluding that the remedy for appointed counsels' noncompliance with the state post-conviction rule was not an adequate state procedural ground to bar consideration of the second untimely amended motion. (App. 6 n.4).

Rather than properly focusing upon whether the State's timeliness and verification procedural rules were regularly enforced and promote a legitimate state interest, the court below substituted its judgment for that of the Missouri Supreme Court about what the remedy should be upon a state court finding of "abandonment" by post-conviction counsel. Certiorari is warranted because (1) the court of appeals' "adequacy" determination conflicts with the this Court's "independent and adequate" jurisprudence and decisions of the Missouri Supreme Court governing the state's post-conviction rules, (2) "undermine[s] the State's interest in enforcing its [criminal] laws[,]" (3) casts serious doubt as whether Missouri's procedural rules are enforceable, and (4) renders illusory the important interest in finality served by those state procedural rules. See Coleman, 501 U.S. at 731, 750. And as discussed

infra, at 22-23, that determination by the court of appeals engrafts a constitutional right to the effective assistance of counsel upon state collateral proceedings.

B. The Court of Appeals recognized a federally-protected right to the effective assistance of counsel in a collateral proceeding in determining that the state procedural rule barring consideration of a second untimely amended motion was inadequate as a matter of federal law. The court below allocated the risk of attorney error in a collateral proceeding to the State, having concluded that post-conviction counsels' failure to comply with a procedural rule presumably affected the content of the post-conviction motion.

The court below "believe[d] that Mr. White was denied a fair opportunity to seek relief in this case because the procedural rule that barred his second amended petition was neither firmly established nor readily ascertainable." (App. 10).[5] White's access to a lawyer in the post-conviction proceedings resulted, however, from a *state* decision and was provided by *state* rule. Notwithstanding this fact, the court below believed that the state remedy to a violation by post-conviction counsel of a state procedural rule did not go far enough: "We cannot see why such an abandonment, [wherein White's first post-conviction counsel withdrew without leave of court thus] forcing Mr. White's second attorney to prepare and write a motion in fourteen days, would not include *the content of the motion*." (App. 8) (emphasis added).

White prevailed below because that court held for the first time that an error by post-conviction counsel, which could

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[5]As demonstrated supra, at 16-17, the conclusion that the state procedural rule was inadequate is unfounded.

not constitute a violation of a constitutional right to counsel, see Coleman, 501 U.S. at 752; Finley, 481 U.S. at 559; Giarratano, 492 U.S. at 10 (plurality), can nevertheless be the basis for rendering "inadequate" a state procedural ground that otherwise would bar federal habeas review. Put simply, the court of appeals found a constitutional right to the effective assistance of post-conviction counsel under the guise of "adequacy" analysis. The retroactive application of that new rule of constitutional law contravenes Teague v. Lane, 489 U.S. 288 (1989) and Allen v. Hardy, 478 U.S. 255 (1986).

C. The court of appeals' determination that counsel's representation during a post-conviction proceeding, absent the provision of effective assistance of counsel, rendered a state procedural ground inadequate to bar federal habeas review, eviscerates the rule that the performance of post-conviction counsel cannot constitute "cause" to excuse a procedural default of a federal claim.

The Sixth Amendment right to counsel is based upon the recognition "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963). In a first appeal granted as a matter of right, though it is the defendant who initiates the appeal process, the right to counsel under the Constitution is founded upon considerations of fundamental fairness and the Equal Protection Clause: "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Douglas v. California, 372 U.S. 353, 357 (1963); Ross v. Moffitt, 417 U.S. 600, 611 (1974).

In Finley, the Court identified that it is the source of the right to counsel's assistance in combination with the nature of the proceeding that decided the issue before it. Id., 481 U.S. at 556. The Court has recognized the crucial distinction between criminal proceedings and those following conviction: in the trial stage of a criminal proceeding, the State attempts to strip from the defendant the presumption of innocence and convict him of a crime; at the appellate stage the defendant needs an attorney "as a sword to upset the prior determination of guilt." Ross, 417 U.S. at 610-611. Based upon this distinction, discretionary appeals and post-conviction proceedings do not implicate the same concerns of fundamental fairness: with a discretionary appeal, the defendant has previously been accorded his appeal of right with the attendant constitutional protections, Ross, 417 U.S. at 613; whereas post-conviction proceedings are not part of the criminal proceedings and are considered to be civil in nature, Finley, 481 U.S. at 557; Giarratano, 492 U.S. at 10. In neither circumstance is the state required to supply a lawyer. Id. Since there is no federally protected right to post-conviction counsel, the lower court's attempt to create on under the guise of adequacy analysis is inconsistent with this Court's precedents.

The court of appeals believed that holding White responsible for the untimely filing of his post-conviction amended motion by counsel was unfair. (App. 10). There is, however, nothing unfair about enforcing filing deadlines, even when the filing occurs one day late. Monger v. Florida, 405 U.S. 958 (1972) (state court default premised upon untimely filing of notice of appeal by one day "adequate" to bar federal relief).

Moreover, absent a constitutional right to counsel, there cannot exist the right to the effective assistance of counsel. Wainwright v. Torna, 455 U.S. 586, 587-588 (1982)

(discretionary review); Coleman, 501 U.S. at 752 (appeal from denial of state habeas corpus petition). That is, only if attorney error amounts to ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 694 (1984), does the Sixth Amendment dictate that the attorney's error must be imputed to the state. See Coleman, 501 U.S. at 754; Murray v. Carrier, 477 U.S. 478, 488 (1986). Thus, because White did not have a constitutional right to counsel in the collateral proceeding, post-conviction counsel's late filing could not be imputed to Missouri. In that respect, this case is like Wainwright v. Torna, 455 U.S. 586 (1982):

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for [discretionary] review. Such deprivation--even if implicating a due process interest--was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law.

Id. at 588 n.4; see also Carrier, 477 U.S. at 492 (1986).

By applying the ineffective assistance of counsel rule of Strickland to a post-conviction proceeding, the court below ignores the distinction in the treatment of attorney error. That is contrary to this Court's pronouncement that a state may make

> a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a

> fundamentally different position--at trial and on first appeal as of right.

Finley, 481 U.S. at 559.

Rather than properly focusing upon whether the State's timeliness and verification procedural rules were regularly enforced and promoted a legitimate state interest, the court below determined that the federal Constitution required that the state provide effective assistance of post-conviction counsel in order for the state procedural ground to be "adequate." Certiorari is warranted because the court of appeals' decision nullifies Finley, Coleman, and 28 U.S.C. § 2254(i), conflicts with every circuit court of appeals that has held that there is not a constitutional right to post-conviction counsel, and will result in an infinite stream of litigation. Absent review by this Court, in the Eighth Circuit there will be a Sixth Amendment right to counsel at every proceeding challenging a state judgment of conviction, because each new petition would present the first opportunity to challenge the effectiveness of prior counsel.

Conclusion

WHEREFORE, Superintendent Luebbers prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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